IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS AMERICAN ELECTRIC POWER SYSTEM, ET AL.

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13962-4-76

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Respondents make no effort to defend the basis asserted by the majority of the Court of Appeals for the decision below. Rather, they would have this Court go even further than that court was willing to go and hold that a regional environmental impact statement is required by Section 102(2)(C) of NEPA for coal

development throughout the so-called Northern Great Plains region, even though the individual proposed projects within that area are not part of an actual or proposed program or plan for such development. We have demonstrated in our initial brief that respondents' contention (as well as the decision below) is contrary to the language of Section 102(2)(C), to its legislative history, to the decision of this Court in *SCRAP II*, and to the overwhelming weight of authority in the lower courts. Hence, despite the 113-page length of respondents' brief, we believe that a relatively brief reply will be sufficient.

The 113 pages of respondents' brief in themselves demonstrate the insubstantiality of their purported belief (see Br., at 33-40) that the Interior Department now has adopted their view that NEPA requires the preparation of "regional" environmental impact statements for coal development despite the absence of any regional plan, program or other region-wide federal action. In any event, the contrary view of Interior, as well as of the Government generally, is plain to see from the brief filed on behalf of Secretary Kleppe and the other federal petitioners.

Under its new coal leasing policy set forth in the Appendix to our initial brief, Interior expects that in "many cases . . ., as determined by the Secretary, several coal leases, or mining plans, may be covered in a single regional environmental impact statement, rather than by multiple environmental impact statements," and that "the region covered will be determined by basin boundaries, drainage areas, areas of economic interdependence, and other relevant factors;" while in "other cases, single coal leases or mining plans will be analyzed . . ." (*id.*, at 10a-11a). This does not differ

significantly from the practice forecast by former Secretary Morton at the commencement of this litigation that "the information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of" NEPA "in a more satisfactory manner" (A. 124), which continued to be the "Department's posture with respect to future statements" at the time of the proceedings on remand (A. 163), was subsequently confirmed by Secretary Kleppe (A. 194-195), and has in fact been the Department's practice as the preparation of the Eastern Powder River EIS as well as individual statements indicates. See page 14 and n. 18 on page 25 of our initial brief.

But however that may be, there is no issue in this case as to the discretion of Interior or other government agencies to consider several proposals for federal action in a single impact statement, whether on a regional basis or otherwise, if the agency deems that to be a more appropriate or convenient means of complying with NEPA than individual statements. The issue here is whether NEPA *requires* the Agriculture, Army and Interior Departments to prepare a single regional environmental impact statement for all government actions relating to coal development throughout the entire Northern Great Plains "region" as defined by respondents, despite the absence of any actual or proposed regional program, plan or other region-wide federal action.

Respondents concede, as they must,[1] that "no actual plan has been produced" (Br., at 86) and that they "do not seek a determination by this Court that regional planning is required" (Br., at 88) as "the com-

[1] See pages 6-9, 16 of our initial brief.

plaint did not request the adoption of a regional plan as contrasted to regional analysis in an environmental statement and no such issue is before this Court" (Br., at 38-39);[2] but rather state that they "simply maintain

[2] While respondents assert a belief "that such a plan would indeed be extremely desirable and that regional planning probably is required by NEPA" (Br., at 38), the depth of their conviction as to the requirements of NEPA in that regard can be measured by the fact that they have refrained from even contending that regional planning is required. As this Court pointed out in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973) *("SCRAP I")*, and reaffirmed in *SCRAP II* (422 U.S., at 319), "NEPA was not intended to repeal by implication any other statute." Hence, NEPA does not compel the federal petitioners or other federal agencies that implement statutes which are nationwide in scope, such as the Mineral Leasing Act, to adopt instead a regional approach or to combine their operations (as respondents in effect would require Agriculture, Army and Interior to do) in a kind of super Tennessee Valley Authority. See the Government's brief, at 43-48. While some of the lower courts have held or suggested that NEPA has a "substantive" as well as a "procedural" content, as the court below noted (App. A, at 31A n. 25 and accompanying text), none of the cases there cited or any others of which we are aware holds or suggests that NEPA requires regional planning or any other particular course of action. Rather, they simply hold or suggest that the federal courts, in reviewing a particular federal action under the arbitrary or capricious standard, may look to whether or not the agency gave good faith consideration to the environmental factors revealed by an impact statement. For example, while the Seventh Circuit has adopted that approach to judicial review, *Sierra Club* v. *Froehlke*, 486 F.2d 946, 951-953 (7th Cir., 1973), it pointed out that under that standard of review, as this Court held in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), the "court is not empowered to substitute its judgment for that of the agency" (486 F.2d, at 953); and the Seventh Circuit has also made plain its view that, apart from its "procedural requirements . . . , no judicially enforceable duties are created by" NEPA as the "declarations of a national environmental policy and a statement of purpose . . . are not sufficient to establish substantive rights." *Bradford Township* v. *Illinois State Toll Highway Auth.*, 463 F.2d 537, 540 (7th Cir., 1972), cert. den., 409 U.S. 1047 (1972). See also, *e.g.*, *Lathan* v. *Brinegar*, 506 F.2d 677, 692-693 (9th Cir., 1974); *McQueary* v. *Laird*, 449 F.2d 608, 612 (10th Cir., 1971).

that the lack of a regional plan cannot change the federal petitioners' responsibilities under NEPA" (Br., at 88-89). In simply making that contention, however, respondents' 113-page brief virtually ignores the language and legislative history of Section 102 (2)(C) of NEPA which, as we have demonstrated (Br., at 26-30), make unmistakably clear that an impact statement is not required until an agency makes a recommendation or report upon a *proposal* for major federal action, and that the impact statement is to be directed at the environmental impacts of the *proposed action* rather than of all actions or potential actions within some broad area such as the 90,000 square mile "region" defined by respondents.

Moreover, while respondents do at least make an effort to deal with this Court's *SCRAP II* decision (see Br., at 42-47, 58-60), their own discussion of the decision indicates, as we have demonstrated in detail in our initial brief (pp. 30-35), that *SCRAP II* is inconsistent with respondents' contention that NEPA now requires a regional impact statement for the entire Northern Great Plains. Thus, respondents concede that this Court held that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal for action" (Br., at 43; emphasis in the original), and that the "crucial criterion for the scope of an environmental impact statement was deemed to be . . . the nature and effect of the particular federal decision" (Br., at 54). And certainly this Court, in emphasizing that both the timing and scope of an environmental impact statement relate to a particular proposal for major federal action, did not hold or suggest that separate recommendations or reports upon a number of individual proposals necessitate a comprehensive

impact covering all such proposals as respondents contend (Br., at 42, 44, 59).

Indeed, respondents' fundamental reliance in this Court, as in the courts below, is upon its "environmentally, geographically and programatically related" theory which is refuted at pages 35-44 of our initial brief. While respondents in making that argument and in their Statement of the Case make a wide variety of broad assertions about potential environmental effects of coal development in the Northern Great Plains, those assertions are neither supported by the findings or evidence in this case nor relevant to the issue before the Court, and respondents' comparisons between various coal producing areas of the country are frequently misleading.[3] In making their many assertions that all projects in the region are "related" or "closely related," respondents have completely ignored the finding of the trial court (F. 31, App. D, 96A) that there "is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by plaintiffs as the 'Northern Great Plains region' are being planned and constructed as part of any integrated plan or program for any such area, or that any such individual

[3] For example, in comparing eastern versus western coal, respondents cite (Br., at 92) a publication entitled "Facts About Coal in the United States" as if it were a Government publication. In fact, it is a private publication by the Environmental Policy Center which fails to distinguish, as most Government publications do distinguish, between total coal reserves and those which are economically recoverable with existing technology. See, *e.g.*, the Mineral Industry Survey prepared by the Division of Fossil Fuels, U.S. Dept. of Interior, Bureau of Mines, "Demonstrated Coal Resource Base of the United States on January 1, 1974" (Washington, D.C., June 1974).

projects are interrelated or integrated with other like projects in such area." Thus, as Secretary Kleppe affirmed (A. 198), approval of a particular mining plan or other proposed action "would not commit the Department to the approval of other mining plans or other coal related development proposals in the Northern Great Plains."

In such circumstances, as we have demonstrated (Br., at 37-42), the courts have consistently held than an environmental impact statement may be limited to the particular proposed project and need not cover other projects even where such projects are part of the same overall program or plan or subject to common studies. At the time we wrote our initial brief, the only contrary decision was *Conservation Soc. of S. Ver., Inc.* v. *Secretary of Tran.*, 508 F.2d 927 (2d Cir., 1974), and that decision had been remanded by this Court for further consideration in the light of *SCRAP II*. See n. 23 on page 37 of our initial brief. The decision of the Second Circuit on remand has now been reported. *Conservation Society* v. *Secretary*, 8 ERC 1762 (2d Cir., 1976).[4] The Second Circuit reversed its prior decision on this issue, stating (*id.*, at 1764) that:

> "We also affirmed the holding of the district court that an EIS be prepared for the entire 280-mile length of Route 7 even though no plan then existed for constructing the superhighway through Connecticut, Massachusetts and Vermont. 508 F. 2d at 934-36. The Supreme Court remand here cites *SCRAP, supra,* which holds that a federal agency must prepare its EIS at 'the time at which it makes a recommendation or report on a *proposal*

[4] A copy is also included as an appendix to the initial brief of the federal petitioners.

for federal action.' 422 U.S. at 320 (emphasis in the original). Here the findings of the district court were that, although federal officials had knowledge of the overall planning process of state officials, there was no 'overall federal plan' for improving the corridor into a superhighway. 362 F. Supp. at 636. The federal action being taken here relates only to the twenty-mile stretch between Bennington and Manchester in Vermont. The stretch is 'admittedly a project with local utility.' 508 F.2d at 935. Hence we see no irreversible or irretrievable commitment of federal funds for the entire corridor and under *SCRAP* no obligation for a corridor EIS. See *Friends of the Earth* v. *Coleman,* 513 F.2d 295, 299-300 (9th Cir. 1975); *Trout Unlimited* v. *Morton,* 509 F.2d 1276, 1283-85 (9th Cir. 1974)."

Hence, the Second Circuit has now fallen in line with the other lower courts on this issue, and its decision demonstrates that those holdings of the lower courts accord with, and indeed are commanded by, this Court's *SCRAP II* decision. Since approval of one proposed coal project in the Northern Great Plains region will not irreversibly or irretrievably commit the federal petitioners to approve other such proposed projects and since concededly there is no "overall federal plan" for that region, NEPA does not require a regional EIS for that 90,000 square mile area just as it does not require a "corridor EIS" for the entire 280-mile length of Route 7.

The decision on remand by the Second Circuit also demonstrates the futility of respondents' effort (Br., at 60-62) to distinguish the cases upon which we rely on the basis of factual differences. While factual differences of course exist, the comprehensive EIS which respondents seek is far more extreme than that sought

in any of those cases, and respondents appear to concede (Br., at 61) that those cases have "a common thread" in that "the courts found 'the proposed project had independent utility so that its approval did not commit the government to other aspects of the overall project, program or plan.'" It is that "common thread," of course, which constitutes the governing principle that the courts have derived from NEPA, and that principle plainly is applicable here. The individual projects not only have independent utility so that approval of one would not commit the government to approve others, but there is also a complete absence here of an overall project, program or plan for the Northern Great Plains region.

None of the cases relied upon by respondents are even remotely to the contrary. Those cases involve either the coverage by an EIS of all aspects of a single project or program (see Br., 50-54), or of cumulative environmental effects within the immediate vicinity of the proposed project (see Br., 54-57). The lengths to which respondents have been forced to go in attempting to dredge up some kind of precedent is illustrated by their reliance (Br., 53-54) upon *Cady* v. *Morton,* 527 F.2d 786 (9th Cir., 1975). That case held that an EIS prepared for approval of a 770 acre mining plan should also have covered the entire 30,876 acres leased by Westmoreland Resources (one of the petitioners here) (*id.,* at 794-795). If respondents' contentions in this Court were correct, the Ninth Circuit should have held that the EIS must cover all proposed federal actions by all applicants within the approximately 58,000,000 acres of the entire so-called Northern Great Plains region. Moreover, the Ninth Circuit also held in *Cady* that the area subject to the approved mining plan could

be mined pending preparation of an EIS for the entire leased area (527 F.2d, at 798), while respondents seek to enjoin all federal actions and operations pursuant thereto pending preparation of a regional EIS for the 90,000 square mile area of their so-called Northern Great Plains region.

Respondents' contention that CEQ, EPA, Interior and other federal agencies have construed NEPA to require comprehensive impact statements for related federal actions (Br., at 62-72), even if true, is irrelevant as it ignores the finding that the individual proposed projects in the Northern Great Plains have not been shown to be related. Moreover, the position of the Government in this case demonstrates its view, including that of Interior, that "regional" impact statements are not required in the absence of region-wide proposed federal action, even though they may at times be prepared as a matter of discretion. Respondents' contention that the projects in the Northern Great Plains are related (Br., at 73-89 not only is contrary to fact and to the findings of the trial court, but reduces in essence to the truism that all projects within a given geographic area are located within that area and have environmental impacts within that area. That could be said, of course, of any area which respondents or anyone else might chose to define as a "region" and is entirely irrelevant. As we have demonstrated, NEPA requires that an EIS consider the environmental impact of the particular proposed major federal action to which an agency recommendation or report relates, not of all such actions within some broad geographic area.

Respondents' argument that it "is impossible, except cumulatively, to analyze 'the environmental impact of the proposed actions[s]'" (Br. at 89; generally at 89-95) demonstrates its deficiency by the addition of the plural "[s]" to the word "action" which appears in the statute in the singular. If the statute required an impact statement to analyze the environmental impact of all proposed actions, rather than of a particular proposed action, respondents might have a case, but that is not what the statute provides or was intended to provide. Moreover, relevant cumulative impacts are considered in the statement upon a particular proposed federal action (see n. 19 on page 27 of our initial brief), as are reasonable alternatives to the proposed action, and the national coal programmatic EIS and Eastern Powder River EIS considered many of the broad issues with which respondents purport to be concerned.

Respondents' argument that CEQ and EPA have concluded that NEPA requires a regional impact statement for the Northern Great Plains, which conclusion is entitled to great weight by this Court (Br., at 95-101), is factually erroneous. The CEQ guideline to the effect that in "many cases, broad program statements will be required" (Br., at 95-96), and CEQ's statement that agencies "should continue the practice of preparing statements covering the cumulative effects of the broader programs, as prescribed in" its guidelines (Br., at 96-97), cannot and do not apply here where there is no "broad program." Moreover, Interior did prepare a national coal program programmatic EIS in connection with its new national coal leasing policy. So, too, the February 1975 statement by the Chairman of CEQ of a principle which he noted that Interior "recog-

nizes" (Br., at 97) could not have referred to an EIS for respondents' Northern Great Plains region, as Interior obviously has not recognized any such requirement.[5] The Administrator of EPA (Br., at 97-98) simply suggested a "study of coal development in this region" (the area of which he did not define), and that suggestion was in fact carried out by the so-called NGPRP study.

Furthermore, the comments of EPA on the draft impact statements included in the final statements made available in connection with the supplemental findings on remand (See App. E, 113A-116A) did *not* object to the fact that the particular statement did not cover a broader area (see, *e.g.*, pp. VII-880 through VII-901, and particularly p. VII-892, in Vol. VI of the Eastern Powder River EIS). And while those statements do not include the comments of CEQ, respondents attached its comments on the draft Eastern Powder River EIS to their Supplemental Memorandum for Appellants (filed on October 9, 1974 in the Court of Appeals). Those comments also do *not* object to the fact that the EIS does

[5] The memorandum by a member of CEQ's staff (Br., at 96) did not state that a regional EIS was required by NEPA rather than simply being deemed by the author to be more appropriate, did not define what the author meant by the Northern Great Plains, and did not represent the position of CEQ itself. Rather, it was simply sent by the Chairman of CEQ to the Secretary of Interior for his consideration of the "comments and suggestions" made therein with a request that the Secretary "let me know what you think," without any endorsement by either the Chairman or by CEQ. (See the covering letter included in Addendum A to Appellants' Reply Brief in the Court of Appeals.)

not cover some broader area, such as respondents' Northern Great Plains region.[6]

Respondents' contention that the area they define as the Northern Great Plains region is the appropriate area for a regional impact statement (Br., at 102-108) is irrelevant in view of the fact that a regional impact statement is not required by NEPA. Moreover, even the majority of the Court of Appeals recognized that "absent abuse of this power, definition of the proper region for comprehensive development, and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees" (App. A, 45A-46A, n. 33). The choice by the federal petitioners of areas for regional impact statements that differ in size from the one preferred by respondents obviously would not be an abuse of power or discretion. See, *e.g., Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225, 230 (7th Cir. 1975), *cert. den.*, 44 U.S.L.W. 3531 (1976)

Respondents' final argument that further agency action cannot be taken prior to the preparation of subregional statements (Br., 108-111) is irrelevant in view

[6] In any event, the CEQ "Guidelines are merely advisory," *Hiram Clark Civic Club, Inc.* v. *Lynn*, 476 F.2d 421, 426 (5th Cir., 1973), and it is the substantive agencies—such as Agriculture, Army and Interior—that in fact administer NEPA, not CEQ or EPA. See *SCRAP I, supra*, 412 U.S., at 694. Hence, it is their views which should be given the most weight by this Court, and they clearly do not construe NEPA as requiring an impact statement for the Northern Great Plains region. And, of course, the views of any agency cannot overcome a contrary statutory mandate. See, *e.g., FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 318 (1965); *Labor Board* v. *Brown*, 380 U.S. 278, 291-292 (1965).

of the facts that NEPA does not require such impact statements, that the issue of the adequacy of such statement prepared by Interior in its discretion (the Eastern Powder River statement) was not raised in the complaint and is not involved in this case,[7] and that Interior has made clear that to the extent that other such statements may be prepared, federal action on the proposed projects involved will not be taken until the statement is prepared (see Br., at 109-110).

In sum, respondents' brief, despite its massive length, does not detract in any way from the demonstration in our initial brief that the plain language of Section 102(2)(C) of NEPA, its legislative history, the *SCRAP II* decision by this Court, and the overwhelming weight of authority in the lower courts all support our position that a regional environmental impact statement for the so-called Northern Great Plains region is not required. This Court should so hold.

Respectfully submitted,

[7] Despite the fact that respondents concede that "the adequacy of the Eastern Powder River Statement is not before this Court" and was not placed in issue by the complaint or litigation below (Br., at 110), and the further fact that (as Judge MacKinnon noted, App. A., 55A n. 5) they have refused to bring a separate lawsuit in that regard on the ground that it would be "inconvenient," respondents now invite this Court to remand that issue to the District Court or, apparently, to give approval to respondents raising the issue in another lawsuit (Br., at 111). Under the circumstances, either alternative is unjustifiable.

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